

McCOY INDUSTRIES, INC.
v.
EASTERN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-76-A

Decided April 11, 1990

Appeal from a decision denying a loan guaranty under the Indian Loan Guaranty and Insurance Program.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Indians: Financial Matters: Financial Assistance

Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

APPEARANCES: Thomas R. McCoy, appellant's President, for appellant; John H. Harrington, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Atlanta, Georgia, for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant McCoy Industries, Inc., seeks review of a June 26, 1989, decision of the Eastern Area Director, Bureau of Indian Affairs (Area Director; BIA), denying a request made by SunBank/Sarasota County, N.A. (bank), for a loan guaranty under the Indian Loan Guaranty and Insurance Program. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

Appellant is a manufacturer and distributor of photovoltaic solar cells and solar cell products. It is wholly owned by its President, Thomas R.

McCoy, a member of the Sault Ste. Marie Tribe of Chippewa Indians. Appellant sought a loan from the bank to cover expenses in connection with its relocation to the Brighton Seminole Indian Reservation, the purchase of inventory and equipment, and other expenses.

On April 25, 1989, the bank submitted a request for loan guaranty to the Eastern Area office, BIA, pursuant to 25 CFR 103.19(a). ^{1/} The bank sought a 90-percent guaranty of a \$175,000 loan it proposed to make to appellant.

By letter of June 26, 1989, the Area Director denied the bank's request, stating: "It appears that the company is relying on two major contracts to continue operating. Without these contracts this company does not demonstrate repayment ability on this amount of loan. It also appears that based on the financial information made available that this company is insolvent at this time."

Appellant's notice of appeal to the Board was received on July 17, 1989. The Board issued a pre-docketing notice on the same date, requesting that the Area Director submit the administrative record. Following two more requests, the Area Director submitted the record on October 5, 1989, and the Board docketed the appeal. Appellant filed a brief and the Area Director filed a motion to dismiss.

Discussion and Conclusions

The Indian Loan Guaranty and Insurance Program is authorized by Title II of the Indian Financing Act of 1974, 25 U.S.C. §§ 1481-1498 (1982 and Supps.), ^{2/} and implemented by regulations at 25 CFR Part 103. 25 U.S.C. § 1481 provides:

In order to provide access to private money sources which otherwise would not be available, the Secretary is authorized (a) to guarantee not to exceed 90 per centum of the unpaid principal and interest due on any loan made to any organization of Indians having a form of organization satisfactory to the Secretary, and to individual Indians; and (b) in lieu of such guaranty, to insure loans under an agreement approved by the Secretary whereby the lender will be reimbursed for losses in an amount not to exceed

^{1/} 25 CFR 103.19(a) provides:

"Upon a lender's approval of an application for a guaranteed loan, the lender will forward the application in duplicate to the Commissioner with a 'Request for Guaranty.' The Commissioner will approve the application by issuance of a 'Guaranty Certificate' which will show the percentage amount of the loan guaranteed, the premium to be paid to the Commissioner and the interest subsidy to be paid on the loan by the United States."

^{2/} All further citations to the United States Code are to the 1982 edition.

15 per centum of the aggregate of such loans made by it, but not to exceed 90 per centum of the loss on any one loan.

25 U.S.C. § 1484 provides:

The application for a loan to be guaranteed hereunder shall be submitted to the Secretary for prior approval. The Secretary shall review each loan application individually and independently from the lender. Upon approval, the Secretary shall issue a certificate as evidence of the guaranty. Such certificate shall be issued only when, in the judgment of the Secretary, there is a reasonable prospect of repayment.

25 CFR 103.15(b) provides: "Reasonable assurance of repayment will be considered to exist: (1) In the case of individuals, where past operations and future prospects of the applicant's operations demonstrate ability to repay the loan from production, earnings, or other assets. Full consideration will be given to the applicant's managerial ability and experience."

On appeal, appellant submits copies of a license agreement and a development agreement which it states are close to being signed. It also disputes the Area Director's conclusion that it is insolvent and submits a financial statement, prepared by its President on August 4, 1989, showing a net worth of \$121,844.

The Area Director argues that this appeal should be dismissed under 43 CFR 4.330(b) for lack of jurisdiction, because his decision was based on the exercise of discretionary authority.
3/

Concerning its authority to review discretionary decisions of BIA officials, the Board recently stated:

The Board has determined that various kinds of decisions by BIA officials are subject to limited review because they are based on the exercise of discretionary authority. These include decisions to acquire land in trust status for the benefit of Indians (e.g., City of Eagle Butte v. Aberdeen Area Director, 17 IBIA 192, 96 I.D. 328 (1989)); to approve conveyances of trust land (Escalanti v. Acting Phoenix Area Director, 17 IBIA 290 (1989)); and to approve loans or grants (e.g., Hamilton v. Acting Anadarko Area Director, 17 IBIA 152 (1989); Lower Elwha Tribe v. Portland

3/ 43 CFR 4.330 provides in relevant part: "(b) Except as otherwise permitted by the Secretary or the Assistant Secretary - Indian Affairs by special delegation or request, the Board shall not adjudicate: * * *. (2) Matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority."

Area Director, 18 IBIA 50 (1989); Honaghaahnii Marketing and Public Relations, Inc. v. Navajo Area Director, 18 IBIA 144 (1990)). The Board has frequently stated that, "[i]n reviewing a discretionary decision, it is not the Board's function to substitute its judgment for that of BIA. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion." Honaghaahnii, 18 IBIA at 148. The Board has also held that a discretionary decision by a BIA official should be reasonable. E.g., Absentee Shawnee Tribe v. Anadarko Area Director, 18 IBIA 156 (1990).

GMG Oil & Gas Corp. v. Muskogee Area Director, 18 IBIA 187, 190 (1990).

[1] Decisions concerning whether or not a particular request for a loan guaranty should be approved are committed to the discretion of BIA. However, the Board may consider whether proper consideration was given to any legal prerequisites to the exercise of discretion.

In this case, appellant alleges that the Area Director failed to follow proper procedures because he apparently did not accept the recommendation of an Area Office employee that the loan guaranty be approved. ^{4/} There is no requirement in the statute or regulations, however, that a BIA deciding official accept the recommendation of a staff member concerning whether to approve a loan guaranty request. Cf. Honaghaahnii Marketing & Public Relations, Inc., 18 IBIA at 148-49.

Appellant also contends that the Area Director took too long to make a decision. It states that it submitted an application for a loan guaranty in September 1988 and that the Area Director did not deny it until 10 months later. There is no evidence of a September 1988 application to the Area Director in the administrative record furnished to the Board. The bank's April 25, 1989, "Request for Loan Guaranty" states that it is a new request. While the Board recognizes that an earlier request may have been made by another lender, the Area Director's consideration of the bank's request in this case does not appear to have been unduly delayed.

Appellant clearly disagrees with the Area Director's analysis of its application. Upon review of the application and the bank's analysis of appellant's financial condition, however, the Board concludes that the Area Director's decision was unreasonable.

^{4/} Appellant states that the Area Director's "trust service representative," who reviewed appellant's application, advised appellant by telephone that he intended to recommend approval of the application to the Area Director.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1 , the Eastern Area Director's June 26, 1989, decision is affirmed. 5/

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge

5/ This result does not preclude appellant from reapplying for a loan guaranty and submitting additional supporting documentation. In particular, a reapplication would appear appropriate if appellant has now entered into the contracts it expected to obtain.